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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 286

ANTONIO PETER GUERRA,
Appellant,

vs.

STATE OF MISSISSIPPI,
Appellee.

JURISDICTIONAL STATEMENT

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INDEX

Opinions Delivered in the Court Below 1
Jurisdiction 2
Questions Presented 3
Federal Constitutional Provision Involved 4
Statement of the Case 4
Substantial Federal Questions 12
Conclusion 13

Appendices—

A. Judgment of the Court Affirming the Conviction A1
B. Judgment of the Court Denying Rehearing A2

Table of Authorities Cited

Ballard v. *United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946) 5, 6, 8

Bass v. *State of Mississippi*, 381 F.2d 692 (C.A. 5, 1967) 8, 11

Brookhart v. *Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) 8

Fay v. *New York*, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (1947) 5, 7

Fay v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963) 10

Fourteenth Amendment to the Constitution of the United States, Section 1 ..... 3, 4, 11

Glasser v. *United States*, 315 U.S. 16, 62 S.Ct. 457, 86 L.Ed. 680 (1942) 5

Harper v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) 7

Hernandez v. *Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L. Ed. 339 (1954) 5, 6

Hoyt v. *Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961) 5, 7, 8

Johnson v. *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) 2, 9

Ladner v. *State*, 197 So.2d 257, 260 (Miss., 1967) 4

Mississippi Code, 1942, Section 2043 2

Mississippi Code, 1942, Section 1762 3

Patton v. *United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930) 9

Reed v. *State*, 199 So.2d 803 (Miss., 1967) 4

Reynolds v. *Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) 7

Schinall v. *State*, 199 So.2d 251 (Miss., 1967) 4

Smith v. *Texas*, 311 U.S. 129, 61 S.Ct. 164, 85 L.Ed. 84 (1940) 5

State v. *Hall*, 187 So.2d 861 (Miss., 1966) 4, 7, 12

Strauder v. *State of West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880) 5

Thiel v. *Southern Pacific Company*, 328 U.S. 217, 66 S.Ct. 948, 90 L.Ed. 1181 (1946) 5, 6

28 U.S.C. Sec. 1257 (1) 2

42 U.S.C. 1443 8

42 U.S.C. 1981 8

U. S. ex rel. Goldsby v. *Harpole*, Miss., 263 F.2d 71, 83 (1959) 11

White v. *Crook*, 251 F.Supp. 401 (1966) 2, 5, 7, 11

Yick Wo v. *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) 7

Zucht v. *King*, 260 U.S. 174, 177, 43 S.Ct. 24, 25, 67 L.Ed. 194, 198 (1922) 12

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JURISDICTIONAL STATEMENT

OPINIONS DELIVERED IN THE COURT BELOW

The opinion of the Supreme Court of Mississippi is reported at 209 So.2d 627 and was entered on the 15th day of April, 1968. The opinion was "PER CURIAM. Affirmed.", and is not appended hereto. The judgment is appended hereto in Appendix A, infra, at page A1. Rehearing was denied on the 13th day of May, 1968. It likewise is reported at 209 So.2d 627, and the order is appended hereto in Appendix B, infra, at page A2.

JURISDICTION

The appellant was indicted (R. 2) on a charge of burglary of a building in violation of Section 2043, Mississippi Code of 1942, which provides:

> "Every person who shall be convicted of breaking and entering, in the day or night, any shop, store, booth, tent, warehouse, or other building or private room or office therein, ship, steamboat, flatboat, or railroad car, in which any goods, merchandise, or valuable thing shall be kept for use, sale, deposit, or transportation, with intent to steal therein, or to commit any felony, or who shall be convicted of breaking and entering, in the day or night time, any building within the curtilage of a dwelling house, not joined to, immediately connected with, or forming a part thereof, shall be guilty of burglary, and imprisoned in the penitentiary not more than seven years."

The appellant was convicted on the 9th day of May, 1967 (R. 49, 50), and was sentenced to serve seven years in the Mississippi State Penitentiary at Parchman (R. 51) on the 10th day of May, 1967. A motion for a new trial (R. 52) was overruled (R. 53) on the 11th day of May, 1967, and the appellant perfected an appeal to the Supreme Court of Mississippi (R. 54-56).

The Supreme Court of Mississippi affirmed on the 15th day of April, 1968, and rehearing was denied on the 13th day of May, 1968.

A notice of appeal was filed in the Supreme Court of Mississippi on the 28th day of June, 1968.

The statutory provision for leave to confer on this Court jurisdiction of the appeal is 28 *U.S.C.* § 1257(1).

The cases believed to sustain the jurisdiction are *White* v. *Crook*, 251 F.Supp. 401 (1966), and *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

The validity of a statute of the State of Mississippi is involved in this appeal. The statute, Section 1762, *Mississippi Code of 1942*, is as follows:

> "Every male citizen not under the age of twenty-one (21) years, who is either a qualified elector, or a resident freeholder of the county for more than one year, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five (5) years and who is not a common gambler or habitual drunkard, is a competent juror; but no person who is or has been within twelve (12) months the overseer of a public road or road contractor shall be competent to serve as a grand juror. But the lack of any such qualifications on the part of one or more jurors shall not vitiate an indictment or verdict. However, be it further provided that no talesman or tale juror shall be qualified who has served as such tales juror or talesman in the last preceding two (2) years; and no juror shall serve on any jury who has served as such for the last preceding two (2) years; and no juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term."

QUESTIONS PRESENTED

1. Whether a conviction and sentence procured after indictment and trial by grand and petit juries which did not reflect a cross-section of the community, from which women were excluded by statute, violates the equal protection and due process clauses of the *Fourteenth Amendment*?

2. Whether the rights stated in the above question are waived when raised for the first time on a petition for rehearing?

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

This case involves Section 1 of the *Fourteenth Amendment* to the *Constitution of the United States*, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Mississippi Supreme Court held in *State* v. *Hall*, 187 So.2d 861 (Miss., 1966). it was not a denial of due process of law or equal protection of the laws to exclude women from jury service. The Mississippi Supreme Court held in *Ladner* v. *State*, 197 So.2d 257, 260 (Miss., 1967), that in order for an accused to complain that he has been discriminated against, it must appear that the accused is a member of the class discriminated against. The Court followed *Hall* and *Ladner* in *Schinall* v. *State*, 199 So.2d 251 (Miss., 1967), and *Reed* v. *State*, 199 So.2d 803 (Miss., 1967). It would therefore, have been a futile and empty gesture to have raised in the trial court or the Mississippi Supreme Court the question of the exclusion of women from jury service. The question of the exclusion of women from jury service was raised for the first time in a petition for rehearing on behalf of appellant filed on April 15, 1968, which was denied on May 13, 1968 (App. A2).

The statutory exclusion of all women, as incompetent jurors from the grand jury which indicted appellant and

from the venire and petit jury which found appellant guilty is in conflict with principles announced by this Court. *Smith* v. *Texas,* 311 U.S. 129, 61 S.Ct. 164, 85 L.Ed. 84 (1940); *Glasser* v. *United States,* 315 U.S. 16, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Thiel* v. *Southern Pacific Company,* 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946); *Ballard* v. *United States,* 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946). Although only a privilege at common law, the right to trial by a fair and impartial jury in States which provide for trial by jury is, in our democratic society, a deeply fundamental right.

Competence to sit on a grand or petit jury is a matter of individual capacity, not a question of group or class. *Thiel* v. *Southern Pacific Co.,* 328 U.S. at p. 220. This Court has rejected the arbitrary and systematic exclusion from jury service of all wage earners, *Thiel* v. *Southern Pacific Co., supra;* all women, *Ballard* v. *United States, supra;* all Mexican-Americans, *Hernandez* v. *Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 339 (1954); and all Negroes, *Strauder* v. *State of West Virginia,* 100 U.S. 303, 25 L.Ed 664 (1880). Although a State may exclude limited and well defined individuals from jury service, excluded classifications may not be arbitrary or capricious. The systematic exclusion by legislative edict of all females from the grand and petit juries which indicted and convicted appellant is arbitrary and capricious and constitutes an unreasonable classification. The pertinent Mississippi statute does not create an exemption which otherwise qualified females may elect to accept or waive; rather it constitutes a complete exclusion of all females from jury service. Compare *White* v. *Crook,* 251 F.Supp. 409 (D.C. Ala. 1966) and *Hoyt* v. *Florida,* 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed2d 118 (1961). See also *Fay* v. *New York,* 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (1947). In *Hoyt,* and *Fay,* this Court found it constitu-

tionally permissible for a state to relieve females from jury service unless they elected to serve. The question of the constitutional impermissibility of excluding all females from jury service previously expressly reserved is answered affirmatively in the *Thiel, Ballard* and *Hernandez* cases.

Females constitute approximately 52 percent[1] of the voting age population in Mississippi and therefore represent approximately one-half of the potentially eligible jurors; accordingly appellant was denied a trial by a jury truly representative of a cross-section of the community. As this Court noted in *Ballard* v. *United States, supra,* at 193-94:

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot. who would claim that a jury were truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

Moreover, the legislative classification in issue herein, is not a limited exemption but a total exclusion, and is

1. See U. S. Census of Population, Miss. Tables 94-96.

wholly without reason or basis in some rational foundation. The Fifth Circuit expressly so held in the *White* v. *Crook* case. In *State* v. *Hall, supra,* the Supreme Court of Mississippi held that statutory exclusion of all females from jury service was a reasonable classification in light of the State's public policy to continue their service as mothers, wives, and homemakers and also to protect them from the filth of and noxious atmosphere that so often pervade a courtroom during a jury trial. Assuming the validity of the goal of Mississippi's public policy, the method employed by the State to effectuate its policy i.e. total statutory exclusion is unconstitutional.

The right to trial by a fair and impartial jury is a fundamental right preservative of many other rights, *Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and thus any classification which tends to invade or restrict that right "must be closely scrutinized and carefully confined." *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169 (1966) and cases cited therein. Mississippi could achieve its express public policy by allowing females an exemption which they might exercise if they so elected. *Fay* v. *New York, supra; Hoyt* v. *Florida, supra.* Nor is the justification for the state policy consistent with State practices through which women are admitted to hold state offices, are members of the state bar, judges, commissioners and reporters in state courts. Moreover females who choose to are freely admitted to all state courtrooms as spectators as indeed they must be. *In re Oliver, supra.* Weighing the importance of petitioner's right to trial by a fair and impartial jury and the importance of maintaining the purity of the jury system against the extreme method Mississippi has chosen to effectuate its public policy, this Court

must conclude that the instant cause presents a serious question concerning the administration of criminal justice. See *Ballard* v. *United States*, 329 U.S. 189; *Hoyt* v. *Florida*, 368 U.S. at p. 58.

A recent case which sheds much light on the matter of exclusion of women from jury service is *Bass* v. *State of Mississippi*, 381 F.2d 692 (C.A. 5, 1967). The Court of Appeals for the Fifth Circuit refused to remove the *Bass* case solely because 42 *U.S.C.*, Sections 1443 and 1981, provide for removal only in terms of "racial equality" and not in terms of "discrimination because of sex." The Court stated (381 F.2d 696):

> "But *Fay* was heavily laden with express doubts as to the standing of the defendants, not being women, to raise the issue, a matter upon which this Court has no doubts in testing the constitutional validity of a State Court jury, Grand or Petit. Labat v. Bennett, 5 Cir., 1966, 365 F.2d 698 (en banc) (see note 5, supra). But in the light of Hernandez v. State of Texas, 1954, 347 U.S. 475, 478, 74 S.Ct. 667, 98 L.Ed. 866, and the Court's cautious language and careful restriction to the narrowest possible issue in *Hoyt*, there is enough basis for an arguendo assumption that when this issue is directly presented the Supreme Court would hold that an absolute statutory exclusion—not exemption—of women as jurors is unconstitutional."

We hope that we have demonstrated that the right to be tried by a jury comprising a cross-section of the community is a federally guaranteed constitutional right. The next question is whether the appellant waived that right. It was held in *Brookhart* v. *Janis*, 384 U.S. 1, 5, 86 S.Ct. 1245, 1247, 16 L.Ed.2d 314 (1966):

> "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption

against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 U.S. 60, 70-71, 62 S.Ct. 457, 464-465, 86 L.Ed. 680, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461."

This Court has historically imposed strict requirements on effecting waivers. This Court stated in *Patton* v. *United States,* 281 U.S. 276, 312, 50 S.Ct. 253, 74 L.Ed. 854, 870 (1930):

"* * * before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."

There is a complete absence in this record of any such consent of the District Attorney, sanction of the Circuit Court or consent of the appellant.

This Court stated in *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938):

"* * * 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

"The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." (304 U.S. 465, 58 S.Ct. 1023, 82 L.Ed. 1467).

Two decades later, this Court in *Fay* v. *Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), held that a federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies. The Court pointed out, however (372 U.S. 439, 83 S.Ct. 849):

> "* * * We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.
>
> "But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. Price v. Johnston, 334 U.S. 266, 291, 68 S.Ct. 1049, 1063, 92 L.Ed. 1356. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. Cf. Carnley v. Cochran, 369 U.S. 506, 513-517, 82 S.Ct. 884, 888-891, 8 L.Ed.2d 70; Moore v. Michigan, 355 U.S. 155, 162-165, 78 S.Ct. 191, 195-197, 2 L.Ed.2d 167. A choice

made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question. E.g., Rice v. Olson, 324 U.S. 786, 65 S.Ct. 989, 89 L.Ed. 1367." . .

In *U. S. ex rel. Goldsby* v. *Harpole,* Miss., 263 F.2d 71, 83 (1959), the defendant did not raise the question of systematic exclusion of Negroes from jury service during his trial. He later raised it on application for habeas corpus, after his case had become final on direct appeal. In ruling that he had not waived the question, the Court said,

> "Even in handling civil litigation, there are limitations upon the implied authority of an attorney to make decisions for his client. Few, if any, would argue that, without consulting his client, an attorney has implied authority to submit his cause to arbitration, or to any but a legally constituted tribunal. When not merely the client's property but his life is at stake, it is all the more essential that an attorney should advise with his client before waiving objections to a trial jury unconstitutionally and discriminatorily constituted."

The Fifth Circuit has paved the way for this Court in *Goldsby, Bass,* and *White* v. *Crook* to extend the protections of the *Fourteenth Amendment* to all our citizens. Our hope is that this Court will finish the job.

This appellant, although male, has standing to complain of the provisions of Section 1762, *Mississippi Code of 1942,* which violates the due process clause and equal protection clause of the *Fourteenth Amendment* to the *Constitution of the United States,* and we respectfully request this Court to so hold.

SUBSTANTIAL FEDERAL QUESTIONS

It was held in *Zucht* v. *King*, 260 U.S. 174, 177, 43 S.Ct. 24, 25, 67 L.Ed. 194, 198 (1922):

> "The bill contains also averments to the effect that, in administering the ordinance, the officials have discriminated against the plaintiff in such a way as to deny to her equal protection of the laws. These averments do present a substantial constitutional question. Neal v. Delaware, 103 U.S. 370, 26 L.Ed. 567."

Certainly, the right of a woman to serve on a jury, or the right of a man to be tried by a jury which is comprised of a cross-section of the community, presents as substantial a constitutional question as the right to go to a public school without first presenting a certificate of vaccination.

Attorneys for the appellant cannot improve on the language of Chief Justice W. N. Ethridge, Jr., in his dissent in *State* v. *Hall*, 187 So.2d 861, 871 (1966):

> "Mississippi was one of the first states to emancipate women from the medieval, common-law limitations on their right to own and control property. This occurred before the Civil War. The Nineteenth Amendment, effective in 1920, prohibited denial of their right to vote. Equal participation in the administration of justice is also a fundamental right of citizenship. Assuredly this would include the right to serve on juries. The majority opinion concludes that whether women shall serve on juries is a legislative question. However, that does not answer the issue of whether absolute denial on the basis of sex only is a denial of due process and equal protection of the laws.
>
> "Jury service is not just a privilege, but a form of participation in the processes of government. It is a responsibility and right possessed by all citizens, regardless of sex. Certainly a statute completely and

absolutely excluding over one-half the population of this state from eligibility for jury service is a classification without any reasonable basis. For physiologic and other reasons, a state may validly grant women an elective exemption from jury service. But Mississippi wholly denies them the right to participate as members of juries. A classification must have some reasonable basis in order to comply with due process and equal protection. A complete exclusion of half the population with no rational basis for the classification, other than sex, is a denial to the women citizens of this state of their constitutional right."

The ruling of the Supreme Court of Mississippi was such as to bring this case within the jurisdictional provisions relied on heretofore and the cases cited to sustain the jurisdiction. The questions here presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, as heretofore shown.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that probable jurisdiction should be noted in this case.

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